

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 04-50 ERIE

JOHN JOSEPH PRICE, JR.

SENTENCING

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Tuesday, October 10, 2006.

APPEARANCES:

CHRISTIAN A. TRABOLD, Assistant United States
Attorney, appearing on behalf of the Government.

THOMAS W. PATTON, Assistant Federal Public

Ronald J. Bench, RMR - Official Court Reporter

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1 PROCEEDINGS

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3 (Whereupon, the proceedings began at 1:30 p.m.,
4 on Tuesday, October 10, 2006, in Courtroom C.)

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6 THE COURT: This is the time that we've set for
7 sentencing in the case of United States versus Price at
8 Criminal No. 04-50 Erie. And there has been an objection filed
9 to the presentence report by the defendant. Specifically,
10 objecting to the government's failure to have moved for an
11 additional third point pursuant to United States Sentencing
12 Guideline 3E1.1(b). And this is an issue that we need to
13 resolve before we move on to sentencing. All right, Mr.

14 Patton, you've got the pulling oar here.

15 MR. PATTON: Your Honor, I believe both parties
16 agree that you can review the government's refusal to make a
17 motion for the third point basically along the lines that have
18 been outlined over the years by various Courts of Appeals --

19 THE COURT: It's the same standard as I would apply
20 in passing upon the failure to move for a downward departure
21 under 5K?

22 MR. PATTON: Correct.

23 THE COURT: I agree with that, that's the
24 appropriate backdrop.

25 MR. PATTON: Okay. It is our position in this case

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1 the government's refusal to move for the third point, number
2 one, punishes Mr. Price for exercising his constitutional right
3 to have this court determine whether or not the evidence seized
4 from his house was seized in accordance with the Fourth
5 Amendment. And, also, that the government's denial of the
6 motion is not rationally related to a legitimate government
7 objective.

8 First, you want to deal with why didn't they give
9 the third point in this case. As I see from the government's
10 papers, the only reason they're not giving it is because a
11 motion to suppress was filed. In a footnote, the government
12 says here are some things that we consider. And we consider it
13 on a case-by-case basis --

14 THE COURT: Mr. Patton, let me make a suggestion
15 because I think we've got the cart before the horse here. I
16 think the issue I need to address first is -- and I think I'm
17 going to have Mr. Trabold come up and do this first, is I'm
18 going to have the government address your contention, factual
19 contention, that there is an office-wide policy, that whereby
20 the government will not move for the third point any time a
21 suppression motion is filed, regardless of the amount of work
22 that's involved. I need to first get that thing resolved. Let
23 me talk to him. All right, Mr. Trabold, do you want to come up
24 here.

25 MR. TRABOLD: Your Honor, there simply is no such

1 policy. The U.S. Attorney's Office policy is encapsulated in

2 footnote 1 of our brief. Even factually, recently the
3 government has moved for the third point, just off the top of
4 my head, the Alesha Eberle case, where she filed a motion to
5 suppress. So it's simply not the case that there's a blanket
6 policy to not move for the third point any time a defendant
7 files a motion to suppress.

8 THE COURT: In other words, you can represent as an
9 officer of the court, based upon your knowledge of what's going
10 on in your own office, that the mere filing of a suppression
11 motion in and of itself as a blanket policy will not preclude
12 the government from moving for the third point?

13 MR. TRABOLD: That is correct. That is because
14 different cases present different factual, not only in a case
15 where the offense facts are different from every other case,
16 but also just from a procedural standpoint, there may be
17 reasons why the government would decide to move for the third
18 point, even in situations where a defendant has filed a motion
19 to suppress.

20 THE COURT: All right, let's switch now. That
21 addresses that question.

22 MR. PATTON: Your Honor, I just want to respond to
23 that in this way. I have been informed by two separate

24 Assistant United States Attorneys in the Erie office that they
25 had been informed by their Pittsburgh office that if a plea

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1 agreement, a proposed plea agreement was sent down, wherein
2 someone was requesting a conditional plea --

3 THE COURT: So they could take an appeal on a
4 suppression issue?

5 MR. PATTON: So they could take an appeal. And if a
6 motion to suppress had been litigated and the government had to
7 put witnesses on, that there would not be -- the plea agreement
8 wouldn't be approved with the third point.

9 THE COURT: Is that, based on your understanding, is
10 that because of the conditional plea or because of the fact the
11 thing was litigated in the first instance?

12 MR. PATTON: I don't know. I want to make something
13 clear here, I'm not trying to get anybody in trouble and I'm
14 not calling Mr. Trabold a liar, saying that he's untruthful.
15 What I am telling you is I have personally been told that look,
16 if we have to put a witness on to litigate a motion to
17 suppress, no third point. And I've been told that by two

18 separate assistants. So, I mean, obviously, in the Eberle case
19 there was a motion to suppress and witnesses were called and
20 the government has asked for the third point. So it's
21 happened. But that's what was told me.

22 THE COURT: Well, all that having been said, the
23 fact that assuming for the sake of discussion there is not in
24 fact, as history would at least suggest, and as Mr. Trabold has
25 indicated, an office-wide policy to never move for the third

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1 point in the face of a suppression motion. That having been
2 said, go on and address your argument in this particular case
3 anyways?

4 MR. PATTON: In this particular case, the government
5 has identified no conduct on Mr. Price's part to indicate that
6 he did not timely accept responsibility, other than the fact
7 that a motion to suppress was filed and litigated. Even though
8 in the footnote, the government says well, they take into
9 consideration whether the defendant has engaged in obstruction
10 of justice. There's been no indication that Mr. Price has done
11 that. In fact, the presentence report does not indicate that

12 Mr. Price should receive a two-level enhancement for
13 obstructing justice.

14 The government's footnote identifies the defendant's
15 conduct while on release or incarcerated pending resolution of
16 his case. Well, Mr. Price has been incarcerated the entire
17 time, there's been no indication that he's done anything while
18 he's been incarcerated that would somehow fail to show
19 acceptance of responsibility on his part.

20 It says "whether the defendant has afforded the
21 government and the judiciary the ability to allocate their
22 resources efficiently."

23 THE COURT: What page is that?

24 MR. PATTON: It's page 14.

25 THE COURT: I have it.

1 MR. PATTON: Again, it lists "whether the defendant
2 has afforded the government and the judiciary the ability to
3 allocate their resources efficiently." While in this case, as
4 we put forth in our papers, a plea agreement was reached in
5 four days after you ruled on the motion to suppress. So it

6 became very clear that the government did not have to prepare
7 for trial, set aside time for a trial, and your Honor did not
8 have to set aside time on your calendar for a trial in this
9 case.

10 Finally, the government says, they consider "whether
11 the defendant has resolved his case in a manner consistent with
12 acceptance of responsibility." And in this case the only issue
13 raised by the government is to try and claim that Mr. Price has
14 not resolved his case in a manner that was consistent with
15 acceptance of responsibility is the fact he litigated a motion
16 to suppress. There is nothing, other than the litigation of
17 the motion to suppress, that can be motivating the government's
18 decision in this case not to ask for the third point. And,
19 in fact, part of the whole government argument is well, we're
20 using our power over the third point to try and deter people
21 from filing motions to suppress. If that is the avowed purpose
22 of not granting the third point, kind of -- as a condition
23 precedent to that, the denial of the third point is conditioned
24 on the fact that a motion to suppress was filed.

25 THE COURT: I've read your papers, I'm familiar with

1 your position. Let me talk to Mr. Trabold.

2 MR. TRABOLD: Yes, your Honor.

3 THE COURT: Just really briefly. Just a

4 hypothetical, just for purposes of discussion. A suppression

5 motion is filed based only a facial attack of the sufficiency

6 of an affidavit for probable cause. Doesn't require

7 litigation. Doesn't require -- wrong term, it doesn't require

8 a full-blown hearing, just requires the court to look at it and

9 make the determination. As a general proposition, is that

10 defendant at a greater risk of losing the third point than

11 someone who never filed the facial attack on the affidavit?

12 MR. TRABOLD: Just let me make sure I understand

13 your factual predicates for the hypothetical. A defendant

14 files a suppression motion which doesn't require the government

15 to call any witnesses, in general terms?

16 THE COURT: I mean there are two types of

17 suppression issues. One, you got to have a hearing, the other

18 one is a pure question of law. I'm talking about the other

19 kind, which we have around here frequently. Is that defendant,

20 as a general proposition, recognizing your position that things

21 are case by case, has he or she weakened the likelihood that

22 they're going to see a third point -- as you understand the lay

23 of the land today?

24 MR. TRABOLD: Well, as it relates to a defendant

25 that's never filed a motion to suppress?

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1 THE COURT: Yes, that never files one at all?

2 MR. TRABOLD: Well, I would think that he would be

3 in a weaker position than a defendant that never files a motion

4 to suppress at all. However, the way I understand our office's

5 approach to this issue, is the determination is made largely on

6 the amount of work that the government has to expend in

7 responding to the motion.

8 THE COURT: In this case, because after all the

9 language of 3E1.1(b) does talk about trial preparation or the

10 equivalent thereof?

11 MR. TRABOLD: Right.

12 THE COURT: Tell me in this case, as the government

13 saw it, as you see it, why you believe that the government was

14 essentially put to the same test, if you will, in terms of

15 preparation, by virtue of getting ready and litigating this

16 suppression motion, as if you would have gone to trial?

17 MR. TRABOLD: Well, this case is really the

18 discovery of the evidence and the circumstances surrounding the

19 search of the Price residence, were the entire case. Counsel

20 makes reference to the fact that the government would have had

21 to call an expert witness. I don't necessarily agree that the

22 government had to call any expert witness in this case.

23 Methamphetamine was found at Mr. Price's residence. So that

24 fact in and of itself to me negates the calling of an expert

25 witness. Even if we had to call an expert witness, that

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1 testimony is not anywhere near as expansive and comprehensive

2 as counsel claims in his second filing. But in this case, you

3 had the testimony of two officers that testified which was,

4 obviously, the sum and substance of the government's case in

5 chief here. They went into the house -- there's an issue as to

6 whether consent was obtained or not, but they obtained consent,

7 and they discovered the meth making paraphernalia that were in

8 Mr. Price's residence.

9 Beyond that, the government had to prepare to
10 cross-examine Mr. Price's girlfriend, who ultimately did not
11 testify. But not only did I have to prepare to cross-examine
12 her, I also had the agents go out and obtain what I would call
13 impeachment material on her, which we ordinarily do in a trial
14 setting. They had to go get her prior criminal history, they
15 had to go get other things, perhaps were impeachment material
16 on her, past drug use, things like that.

17 This isn't a case where we have a complex
18 white-collar trial that would have taken the government two
19 months to put on its case in chief. This is a case where I put
20 on my case in chief on in absolutely no more than a day and a
21 half. And what I had to put on at the suppression hearing was
22 in fact the trial. And it doesn't change that to say well, the
23 government would have to file voir dire questions or proposed
24 jury instructions because, at least from my experience in trial
25 preparation in federal court, those things are not all that

1 time consuming and often times you can piggyback that
2 preparation on the preparation that's done in a prior trial of

3 the same type.

4 THE COURT: What do you make of this United_States

5 v._Vance case?

6 MR. TRABOLD: Well, I don't make anything of it

7 because it occurs before the PROTECT Act, which means it's

8 entirely distinguishable from this case. And it's also

9 distinguishable for all the other reasons I had in my brief,

10 which is that in Vance, no acceptance points were provided at

11 all for Mr. Vance. Whereas, in this case, the government is

12 agreeing that Mr. Price should get the recognition of two

13 points for his acceptance of responsibility. And to me that's

14 a significant difference. In Vance, the government was saying

15 absolutely, he's entitled to nothing. Whereas here, we're

16 saying we're willing to go a considerable amount of the way

17 down the acceptance of responsibility road, we're giving him

18 two points. The only issue here is whether he's entitled to

19 the third point. And Vance sheds no light on -- the heart of

20 the matter here is whether under the PROTECT Act amendments to

21 the Sentencing Guidelines, acceptance of responsibility

22 provision, the government can withhold a third point in this

23 case. Any case that counsel cites that predates the PROTECT

24 Act is of no help whatsoever.

25 And the government cites a case from the Ninth

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1 Circuit that is subsequent to Vance, where the court says well,

2 we know you're citing Vance as the idea that you can't withhold

3 the point for somebody exercising their constitutional right.

4 I think that's Espinoza-Cano. But we don't find Vance to be

5 persuasive in the case. And the reasoning in Espinoza-Cano is

6 the same reasoning that applies here.

7 THE COURT: Let me ask you just a couple other

8 questions, then we'll start to wind this thing down. One of

9 the articulated reasons for not moving for a point in the

10 government's papers was the desire to deter frivolous

11 suppression motions. Absent a situation where the government

12 was in fact required to engage, by its lights in the same type

13 of preparation for a hearing, a suppression hearing, that would

14 have been required to prepare for trial, is the desire to chill
15 people from filing suppression motions to weed out the
16 frivolous ones, a legitimate and non-arbitrary reason in and of
17 itself, given the fact that 3E1.1(b) talks about avoiding
18 preparing for trial?

19 MR. TRABOLD: Well, I think it is a legitimate
20 government interest, to seek to not reward people for filing
21 motions that are frivolous. Obviously, the government is on a
22 more solid footing, I think, just by the pure factual
23 circumstance, if there is lengthy litigation over a suppression
24 motion -- by way of example, a suppression motion that takes
25 two or three days to litigate, where the government, both the

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1 government and the defense put on all sorts of witnesses.
2 That's a situation where perhaps there's more meat to the
3 government's claim. But I don't think it's an illegitimate
4 government claim for the government to say part of what we're
5 trying to do here is to prevent defendants from filing
6 frivolous motions under the context that if they do so, there
7 will be no penalty for doing so. And really the frivolous

8 motion animus that the government has ties with one of, to me

9 the most important reason that we gave in our filing here for

10 why we should be allowed to do this. And that is simply this,

11 and counsel has provided no contrary argument to this.

12 Defendants like Mr. Price should not be on the same

13 footing with a defendant that is indicted, almost immediately

14 pleads guilty, waives his right to file, really any appeal,

15 subject to very minor limitations in the plea agreement, and

16 goes on his way after sentencing. Those two defendants should

17 not be on the same footing. And to give Mr. Price the same

18 acceptance of responsibility points, after he litigated a

19 motion to suppress and obtains a conditional guilty plea, which

20 obviously means he's going to appeal to the Third Circuit the

21 whole suppression issue and rehash the whole thing all over

22 again, to give him the same acceptance of responsibility points

23 as somebody that comes in and pretty much pleads guilty and

24 does not ask for a conditional plea, does not seem right to me.

25 And it is well within the government's purview to differentiate

1 between defendants. And there's just no response from counsel

2 in his filings as to why the government shouldn't be allowed to

3 do so. In fact, in the Jones case, the court talks

4 specifically about the government's interest in curtailing the

5 filing of frivolous motions.

6 THE COURT: Is that that district court case?

7 MR. TRABOLD: Correct.

8 THE COURT: Where was that from?

9 MR. TRABOLD: The Eastern District of Virginia.

10 THE COURT: And, finally, since we last talked about

11 this, are you aware of any cases in this circuit that address

12 this issue?

13 MR. TRABOLD: I think we found one unreported

14 case -- I don't want to say it specifically addresses the

15 issue, it's kind of on a tangential point. I am not aware of

16 any Third Circuit case that is directly on point.

17 THE COURT: All right, thank you. All right, Mr.

18 Patton, do you have anything else that you want to say to me.

19 Are you aware of any other cases?

20 MR. PATTON: Not in this circuit.

21 THE COURT: Much less down in Pittsburgh?

22 MR. PATTON: I am not.

23 THE COURT: All right.

24 MR. PATTON: When I e-mailed my office down there
25 asking anyone down there if they have any experience with it,

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1 they have not.

2 MR. TRABOLD: I don't mean to interrupt, this
3 dovetails to that, I talked to our criminal division chief in
4 preparation for this, he wished me luck in forging new ground,
5 I don't know if the issue has ever come up --

6 THE COURT: Why didn't he wish me luck, I'm the one
7 who has to do it. All right, go ahead.

8 MR. PATTON: Judge, in response to Mr. Trabold's
9 claim that we have no response to the government arguing that
10 Mr. Price should not be treated the same as a person who
11 doesn't file a motion to suppress, that's just wrong. Our
12 reply relied primarily on the Fifth Circuit's Washington

13 opinion. We pointed out that filing a motion to suppress has
14 nothing to do with factual innocence. Acceptance of
15 responsibility is saying I accept what I did, and what I did
16 was wrong. But the guidelines say a person who says I admit I

17 engaged in this conduct, but I don't think it violates this
18 particular law or I think this law is unconstitutional, they
19 can challenge the constitutionality of that section, and
20 Section 3E1.1 says you can still get acceptance of
21 responsibility because you're admitting what you did.

22 As the Washington court pointed out, when you're

23 dealing with someone who is filing a motion to suppress, they
24 aren't arguing their guilt or innocence. The whole reason you
25 want the stuff suppressed is because it generally tends to show

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1 that you're guilty. But it's not a question of giving up and
2 saying they didn't find this stuff in my house, I didn't
3 manufacture meth or attempt to manufacture meth. It's simply
4 saying they violated the Fourth Amendment in gaining this
5 evidence. That doesn't have anything to do with factual guilt.
6 And the person who pleads guilty without filing any motions,
7 that, I would submit to you, is more of a function of their
8 attorney looking over the case and saying there just isn't any
9 potential motion to suppress here.

10 I think the Fifth Circuit's response in Washington

11 to this argument about trying to chill the filing of motions to
12 suppress, is very relevant. In that motions to suppress are
13 not designed solely to benefit the defendant in a particular
14 case. The Fourth Amendment, in the exclusionary rule, in the
15 litigation of the Fourth Amendment issues, is designed to deter
16 future police misconduct. The Supreme Court has said again and
17 again the purpose of the exclusionary rule is not to punish the
18 individual officer who may be found to have violated the Fourth
19 Amendment. It is not intended to reward the defendant, that's
20 not its purpose. Its purpose is to deter law enforcement from
21 engaging in future violations of the law. And you don't have
22 to -- a defendant does not necessarily have to win on the
23 merits of a motion to suppress for that purpose to be achieved.
24 If following the hearing in Mr. Price's case, Agent Schirra is
25 more careful the next time he gets a third-party

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1 consent in a case, that motion has had a beneficial impact.

2 We actually won part of the motion --

3 THE COURT: Or if the circuit reverses my decision?

4 MR. PATTON: Correct, if they clear up the law. Mr.
5 Trabold talked about the Eberle case. We litigated that motion
6 to suppress in Eberle. You ultimately found that it should not
7 be suppressed. But if Detective Lynn, after going through what
8 she went through on the stand, does a better job the next time
9 she does a forensic evaluation of a computer and documents that
10 better, then that motion has served its larger purpose of the
11 exclusionary rule.

12 Your Honor, we operate in an adversary system. The
13 preamble to the Professional Rules of Conduct say that "as an
14 advocate, a lawyer zealously asserts the client's position
15 under the rules of an adversary system." Allowing one of the
16 parties to the adversary system to act as arbiter of the merits
17 of the other party's motion, is contrary to the entire system.
18 Of course, the government is going to think that a motion to
19 suppress doesn't have any merit.

20 THE COURT: I didn't draft the PROTECT Act.

21 MR. PATTON: The people who did draft the PROTECT
22 Act told you why it was that they were giving the government
23 the power over the third point. They specifically stated that
24 the reason that the third point was now going to require a

25 government motion was because the government would know if it

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1 had to prepare for trial. They did not say that the government
2 was being given power over the third point so that the
3 government could police the filings of motions to suppress.

4 THE COURT: All right, I have your point. Go ahead.

5 MR. PATTON: With the case law, United_States_v.

6 Espinoza-Cano, it distinguished Vance because the Ninth Circuit

7 said look, in the Ninth Circuit if you do a stipulated bench
8 trial, you're not entitled to the acceptance of responsibility
9 because that is different than pleading guilty. That was the
10 way they distinguished Vance. In the 11th Circuit case the

11 government relied on, United_States_v._Gonzalez, there was a

12 four-day suppression hearing. But, also, the 11th Circuit
13 never mentioned Wade, the Supreme Court's decision in Wade at

14 all -- regarding the government's refusal to make a motion, it
15 had to have a rational relation to a legitimate government
16 argument.

17 I've looked at the transcript of the suppression
18 hearing before I came down here. The hearing started at 9:45
19 a.m., and ended at 11:40 a.m. That's an hour and 45 minutes.
20 Some of which was argument. So I just do not see how under any
21 set of circumstances that can be called, preparing for that
22 hearing can remotely be equated with preparing for trial. And
23 Mr. Trabold's explanation for how the government makes its
24 decision, there's an internal paradox there. The more work
25 they have to put into defending the motion, the more

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1 preparation they've had to do, therefore, they don't want to
2 file the third point. But the more merit the motion has, the
3 more effort it's going to take for them to defend it. And,
4 therefore, what's going to happen is they're going to have to
5 put more work on the ones that actually have merit, so those
6 are the people that aren't going to get the third point.

7 THE COURT: One would think, just as an aside, that
8 that would be true as a general proposition. I can tell you
9 that I have spent on occasion more time trying to figure out
10 what's going on in a bad brief than I have in a good brief, but

11 be that as it may.

12 MR. PATTON: Finally, the thing about frivolous
13 motions. The court always has a vehicle within which to punish
14 the filing of frivolous motions. It is unethical to file a
15 frivolous motion.

16 THE COURT: Well -- I'm not going to editorialize.
17 I have your point.

18 MR. PATTON: I would submit that this was not a
19 frivolous motion in this case.

20 THE COURT: I do not consider it to have been a
21 frivolous motion.

22 MR. PATTON: In fact, we went through a couple
23 rounds of briefing because there was a lot of meat there. And,
24 your Honor, if you find that you can't give the third point,
25 there is a basis for exercising your Booker discretion.

1 Because when the Sentencing Commission made up this sentencing
2 table that contains these suggested ranges, that was written
3 with a understanding and a belief that if a person pled guilty

4 in a timely manner, so that there wasn't preparation for trial,
5 that they would get the third point. So if the government
6 starts using other considerations in denying the third point,
7 then that unnecessarily skews the sentences under the
8 guidelines. And it skews them higher than the Sentencing
9 Commission envisioned. And so that is a legitimate reason for
10 you when you're exercising your discretion under 3553(a), to
11 say -- if you conclude, the PROTECT Act says the government has
12 this ability, whether I agree with it or disagree with it,
13 they've not moved for the point, so I can't give the third
14 point. You then are entitled to say I think this is resulting
15 in the guidelines, the advisory guideline range, calling for
16 more time than what the Sentencing Commission intended. And
17 that is a legitimate reason for you to exercise your
18 discretion.

19 THE COURT: All right, thank you, Mr. Patton.
20 Incidentally, just for the record, this is the only objection
21 filed to the report, isn't it?

22 MR. PATTON: Your Honor, there were two other
23 objections that don't go to the merits.

24 THE COURT: We'll get to them. This is the only one
25 that really would affect the guideline calculations, though?

1 MR. PATTON: That is correct.

2 THE COURT: We'll get to the other ones later then.

3 This is an order.

4 ORDER

5 The defendant objects to the government's refusal to
6 move pursuant to U.S.S.G. Section 3E1.1(b), that the defendant
7 receive a third point for acceptance of responsibility.

8 Section 3E1.1(a), provides:

9 "If the defendant clearly demonstrates acceptance
10 of responsibility for his offense, decrease the
11 offense level by two levels."

12 Section 3E1.1(b) provides:

13 "If the defendant qualifies for a decrease under
14 subsection (a), the offense level determined prior
15 to the operation of subsection (a) is level 16 or
16 greater, and upon motion of the government stating
17 that the defendant has assisted authorities in the
18 investigation or prosecution of his own misconduct
19 by timely notifying authorities of his intention to

20 enter a guilty plea, thereby permitting the
21 government to avoid preparation for trial and
22 permitting the government and the court to allocate
23 their resources efficiently, decrease the offense
24 level by one additional level."
25 This version differs from its predecessor in that by

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1 virtue of changes made under the PROTECT Act, discretion to
2 move for the point is now vested exclusively in the government.
3 I also note, parenthetically, that Application Note 6 to
4 Section 3E1.1 provides in pertinent part:
5 "Because the government is in the best position to
6 determine whether the defendant has assisted
7 authorities in a manner that avoids preparing for
8 trial, an adjustment under subsection (b) may only
9 be granted upon a formal motion by the government at
10 the time of sentencing."
11 The first question that the court must answer is
12 what is the appropriate standard for the court to apply in
13 resolving a challenge to the government's refusal to move for a

14 third point. In *United_States_v._Moreno-Trevino*, 432 F.3d 1181

15 (10th Cir. 2005), the court had the occasion to address that

16 issue in some detail. The court observed:

17 "Unlike Section 5K1.1, few courts have considered
18 the government's discretion to file a Section
19 3E1.1(b) motion after the PROTECT Act amendment.
20 The Eighth Circuit concluded that 'the government's
21 failure to file a Section 3E1.1(b) motion must be
22 rationally related to a legitimate governmental
23 end.'" Citing *United_States_v._Smith*, 422 F.3d 715,

24 728, (8th Cir. 2005). "The Sixth Circuit recently
25 stated that a pre-Booker Booker defendant 'was not

1 entitled to a remedy [under Section 3E1.1(b)],
2 unless the claim alleged that the prosecutor's
3 decision not to bring a motion was based on a
4 constitutionally impermissible motive such as race
5 or religion'." *United_States_v._Smith*, 429, F.3d

6 620, 628 (6th Cir. 2005) ...

7 The Moreno-Trevino court continued:

8 "For several reasons we conclude that prosecutors
9 should be afforded the same discretion to file
10 acceptance of responsibility motions under Section
11 3E1.1(b) as substantial assistance motions under
12 Section 5K1.1. First, the text of Section 3E1.1(b)
13 and its accompanying commentary indicate that
14 prosecutors have considerable discretion to file a
15 motion. The language in the amended Section 3E1.1
16 resembles the language found in Section 5K1.1; under
17 both sections, a defendant can obtain an additional
18 adjustment only 'upon motion of the government'.
19 More specifically, a Section 3E1.1(b) motion must
20 state that a defendant's timely notification of
21 pleading guilty 'permitted the government to avoid
22 preparing for trial and permitted the government and
23 the court to allocate their resources sufficiently'.
24 The recent amendment also added an Application Note
25 stating that 'the government is in the best position

1 to determine whether the defendant assisted
2 authorities in a manner that avoids preparing for
3 trial'. U.S.S.G. Section 3E1.1 cmt. n. 6. Thus,
4 the government defines what constitutes timeliness
5 and what constitutes trial preparation, and once
6 those terms are defined the government has an
7 evidentiary advantage." Citing Etienne, and that's

8 at pages 1185-1186. See also United_States_v.

9 Espinoza-Cano, 456 F.3d 1126, (9th Cir. 2006),

10 where the court noted that it was joining the
11 6th, 8th and 10th Circuits in applying the same
12 standard in reviewing a refusal to file a motion
13 under 3E1.1(b), as it would in the context of a
14 failure to file a 5K motion. Specifically, whether
15 that refusal was based on an "unconstitutional
16 motive, (e.g., racial discrimination), or
17 arbitrarily (i.e., for reasons not rationally
18 related to any legitimate governmental interest."
19 Id. at 1136.

20 In the absence of any specific direction to the
21 contrary from the Third Circuit, I find that the approach
22 described in the above cases, in reviewing a refusal to move
23 under Section 3E1.1(b), is appropriate. As an aside, I should
24 also add that I do not find in this case that the defendant's
25 reliance on United_States_v._Vance, 62 F.3d 1152 (9th Cir.

25

1 1995), is well placed. First, it was a PROTECT Act case; and
2 second, I do disagree with that court's blanket statement, to
3 wit:

4 "The amount of preparation by a prosecutor, and the
5 amount of court time which must be scheduled, are
6 far greater for a trial than for a motion to
7 suppress."

8 That statement may or may not be true. But, in any
9 event, it depends on the particular facts and circumstances of
10 each case. That said, as a factual matter, based upon the
11 representations made by the Assistant United States Attorney
12 here, and the fact that I can take notice of the fact that

13 there have been in the past 3E1.1(b) motions filed, even after
14 a suppression motion had been filed, I do not find as a factual
15 matter that there exists an official office-wide policy by the
16 U.S. Attorney to refuse the point any time a suppression motion
17 is or was filed. It's important that I stress this, though.
18 In my view, such an across-the-board policy would be arbitrary
19 and not rationally related to any legitimate governmental
20 interest. Such a per se refusal would not reflect the type of
21 case-by-case analysis and appropriate exercise of discretion
22 that in my view Section 3E1.1(b) requires.

23 Here, the government argues that its refusal to move
24 for the point was based in part upon its extensive preparation
25 for the suppression hearing, which it likens essentially to the

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1 same effort or similar effort that would have been required of
2 it if it had proceeded to trial. Specifically, in this regard,
3 the government argues in its papers the following:
4 "In this case the suppression hearing testimony
5 presented by the government was the overwhelming
6 majority of the evidence that would have been

7 presented at trial. The case simply involved the
8 discovery of methamphetamine making materials on
9 Price's property after a consent search conducted by
10 two officers. The two officers that conducted the
11 consent search were the two officers that testified
12 at the suppression hearing. All that remained for
13 trial was the largely administrative, and most often
14 stipulated to, task of admitting the drug evidence
15 and the laboratory report. The suppression hearing
16 testimony was, in reality, the trial testimony."

17 The government then continued:

18 "Moreover, the government had anticipated that Price
19 would call his girlfriend/common law wife to testify
20 at the suppression hearing since her consent was
21 critical to the suppression issue. The government
22 was aware from defense counsel that she would be
23 present at the hearing and was, in fact, being
24 brought back from California to testify.

25 Ultimately, she was present at the hearing but did

1 not testify. Nevertheless, the government expended
2 resources preparing to cross-examine her and
3 compiling her prior record information and other
4 impeachment materials." (Pages 14 through 15 of the
5 government's response to defendant's objection to paragraph 28
6 of the presentence report.)

7 I find that the government's refusal to move on this
8 basis to be in this case a legitimate exercise of its
9 discretion. Having presided over the suppression hearing, I do
10 not find the government's contention as to the preparation
11 required and its similarity to trial to be unfounded. In
12 short, I find where the government has been required to
13 litigate a suppression motion and the hearing itself requires
14 preparation and presentation of evidence, consistent with the
15 effort that would have been required for trial, the
16 government's failure to move on this basis represents a
17 legitimate exercise of its discretion and is rationally related
18 to a legitimate governmental end. That said, I do not find
19 that the desire to chill the filing of frivolous suppression
20 motions, which by the way Mr. Price's clearly was not, or a
21 desire to conserve resources by denying the point every time a

22 defendant enters a conditional plea to preserve his or her
23 right to appeal a denial of a suppression motion, to be
24 legitimate reasons to deny the point. The appropriate focus,
25 again, is whether or not on a case-by-case basis the government

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1 was required de facto to prepare for trial by virtue of the
2 nature of the suppression hearing. So the objection is
3 overruled.

4 All right, what are the other ones, Mr. Patton, that
5 were not substantive?

6 MR. PATTON: Your Honor, one of them was to
7 paragraph 9, which stated that Mr. Price had sold
8 methamphetamine to Agent Schirra. Mr. Price denies that
9 happened. Mr. Price had been charged with delivery of
10 methamphetamine by Agent Schirra in the state court, those
11 charges were ultimately dismissed. Paragraph 9 also indicates
12 that Mr. Price had alluded the agents from the time of that
13 alleged sale of drugs in April of 2002 until October of 2004.
14 In reality, the charges against Mr. Price that Agent Schirra
15 initially filed, weren't even filed until February of 2004. So

16 there wasn't any alluding then, there weren't any charges
17 pending. Even after the charges were filed, Mr. Price was
18 living in the same house, working at the same garage, they
19 didn't just go to look for him until that time. I know that
20 doesn't impact the sentence, but it is important to Mr. Price.
21 That's in paragraph 9 of your report, your Honor.

22 In paragraph 10 the report states the police
23 obtained consent to search Mr. Price's house. Of course, it is
24 our contention the police did not receive a valid consent to
25 search Mr. Price's house.

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1 THE COURT: All right. Those objections are noted.
2 I make the following findings now with respect to
3 the calculations. The total offense level applicable is 26.
4 With a criminal history category of V. Statutory provision as
5 to custody not more than 20 years. Guidelines 110 to 125
6 months. Statutory provision as to probation one to five.
7 Guidelines ineligible. Statutory provision as to supervised
8 release at least three years. Guidelines three years.
9 Statutory provision as to a fine \$1 million. The guidelines

10 \$12,500 to \$1 million. Restitution is inapplicable under both
11 the guidelines and the statute. A special assessment of \$100
12 applies with respect to both. All right, Mr. Patton.

13 MR. PATTON: Your Honor, I would submit that you
14 should give Mr. Price a sentence within a range of 100 to 125
15 months, which is the range he would have been in had the
16 government filed a motion. The finding by yourself that the
17 government's belief that it had to prepare for trial was
18 reasonable, does not have to equate to a finding that you agree
19 with that, you are limited by what you have found the
20 guidelines state. In attesting that the government's decision
21 to be reasonable. It doesn't mean that you have to agree to
22 it. All I can say is there is no way in the world you can
23 convince me, after practicing in federal court for 10 years,
24 that preparing for a motion to suppress that lasts two hours is
25 the same thing as preparing for trial.

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1 THE COURT: Well, to put a finer point on it and I
2 know I've already done the order, the fact of the matter
3 remains the test is not -- well, let me make two points. The

4 case law indicates that (a), the government is allegedly in the

5 best position to know how it was required to prepare. And I

6 suppose there's a good reason for that. I'm not sitting over

7 their shoulder as they're doing that. And the standard is

8 arbitrariness. To put a finer point on it, those factors in

9 part drove my decision, too. I understand your point.

10 MR. PATTON: To the extent there is some feeling

11 that well, Congress has said this is the way it has to be, so

12 that's the way it has to be. I would submit to your Honor that

13 we have been there before --

14 THE COURT: I was there before, has anything

15 happened on that case; just for the record, the case?

16 MR. PATTON: United_States_v._Jaime.

17 THE COURT: Which is on appeal right now?

18 MR. PATTON: Correct. Where the issue was whether

19 you could consider a 100-to-1 crack to powder disparity in

20 imposing sentence. And the government made the argument, which

21 you accepted, that hey, Congress set this 100-to-1 ratio, for

22 me to not follow that would be to not honor Congress's will on

23 the matter. And the Third Circuit found that in United_States

24 v._Gunter to be wrong. Saying that as long as Congress gets to

25 set the mandatory minimum and they get to set the maximum, but

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1 anywhere in between is up to you. In effect by saying you

2 couldn't deviate from the 100-to-1 ratio, that that was

3 treating the guidelines in effect as mandatory.

4 So I would submit in this case, to the extent that

5 there is a belief that well, Congress says that the government

6 gets their say on the third point and, therefore, I'm powerless

7 to do anything over it, may be correct when you were deciding

8 what the advisory guideline range is, but as the Third Circuit

9 has said, you then have another step of when you decide what

10 the actual sentence is, based on the factors set forth in Title

11 18, United States Code, Section 3553(a), where you have to give

12 a sentence that is "sufficient but not greater than necessary"

13 to achieve the purposes of sentencing. That you can put your

14 beliefs, as the sentencing judge, into play and say look, I

15 realize that when the Sentencing Commission wrote these

16 guidelines and established this sentencing table, they were

17 doing that with the belief that if someone pled guilty well in

18 advance of any proposed trial date, that they'd get the third

19 point.

20 And I would stress the point that I made in our

21 papers that since you came onto the federal bench, I would be

22 willing to bet you have never before today had a defendant not

23 get the benefit of the third point based solely on the fact

24 that the government had to litigate a motion to suppress. And

25 there's no reason why there should be a distinction between all

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1 those people that got sentenced before and people that get

2 sentenced now.

3 THE COURT: All right. Whatever the range is,

4 address the merits of this particular case as to where -- as to

5 how you think that should impact on my thinking?

6 MR. PATTON: Your Honor, Mr. Price obviously has a

7 methamphetamine addiction problem. He has written a letter to

8 your Honor expressing the fact that he understands that. And

9 understanding that it's his problem, he's responsible for the

10 conduct he engaged in based on that addiction. And that he is

11 responsible for hurting his children and his loved ones by

12 allowing his addiction to run his life.

13 He is currently serving an Ohio sentence, but it is
14 important to stress that he was charged with the Ohio offense
15 prior to being charged here. So it's not like he got charged
16 here and went out and committed a new offense. That when you
17 are sentencing him, that a sentence, I would submit, within the
18 range of 100 to 125 months is more than adequate to punish him
19 for this offense.

20 They found methamphetamine manufacturing equipment
21 in his house. But he was not in the process of manufacturing
22 methamphetamine. There was no evidence, to the extent when he
23 was manufacturing methamphetamine, that he was doing it in the
24 house. That he had put anyone in danger during the
25 manufacturing process.

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1 He has tried to maintain a good relationship with
2 his kids. And has coached his kids baseball team. Mr. Price
3 is an intelligent man. When you sit down and you speak with
4 him, he's not dumb. He has done some very stupid things. And
5 he has allowed methamphetamine to cause him to engage in

6 criminal conduct.

7 But he's dealing with some severe diabetes right
8 now. His insulin, they keep raising it, so he's been dealing
9 with that. He's been having trouble in the Erie County Prison
10 getting that worked out. So thankfully he's being sentenced,
11 so he can get back to the Ohio Department of Corrections, where
12 they were doing a much better job of regulating his blood
13 sugar.

14 THE COURT: Are you saying he's not getting his
15 medication over there?

16 MR. PATTON: He's getting it, but he's gone through
17 four different doctors, since the time he's been at Erie County
18 they've had four different staff doctors go through. They
19 haven't been able to get his blood sugar stabilized. They've
20 given him insulin, but they're changing the amounts of the
21 insulin. And I'm not saying any one of them necessarily is
22 being callous towards his needs, but the fact of the matter is
23 the health care at the Erie County Prison just isn't good.

24 But I would ask that you take into account the
25 letters that were written on Mr. Price's behalf that we have

1 submitted to you.

2 THE COURT: The record should reflect I did receive
3 those and have reviewed them.

4 MR. PATTON: I've spoke with Mr. Price about his
5 right of allocution, he does want to rely on his letter.
6 He is not, he doesn't consider himself to be a good
7 extemporaneous speaker, so he wanted to put his thoughts down
8 in writing and submit it to your Honor that way.

9 THE COURT: All right, thank you. Mr. Price, just
10 to be clear, you understand that you do have the right to speak
11 to me now at time of sentencing, but is your lawyer correct
12 that although you understand that, you choose to waive that
13 right?

14 THE DEFENDANT: Yes.

15 THE COURT: All right. Okay, Mr. Trabold.

16 MR. TRABOLD: Well, your Honor, as I understand
17 counsel's point, his point is that, essentially, even though
18 you found that the government was correct in withholding the
19 third point, you should still basically accord Mr. Price the
20 same sentencing ranges as if he was entitled to the third
21 point. And it just doesn't make any sense to me. I don't know

22 why Mr. Price should be placed in the same sentencing range as
23 if you accorded him the third point, when you already
24 established that he is not entitled to the third point.

25 Separate and apart from that, the record in this

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1 case indicates an individual that obviously hasn't been able to
2 control his behavior and conform his behavior to the law. And
3 what perhaps is the most troubling aspect of the presentence
4 report, is the description of his Ohio conviction where he was
5 arrested on March 30, 2005. Which is approximately six months
6 subsequent to the search of his residence that forms the basis
7 for the case we're here on today, which occurred back in
8 October of 2004.

9 And what's troubling to me about this, Mr. Price and
10 the letters from Mr. Price's family portray an individual that
11 is generally an upstanding citizen with a drug problem and
12 those types of things. That is belied by this conviction in
13 Ohio. Not only was Mr. Price in a vehicle with a whole host of
14 methamphetamine making materials, six months after his
15 residence was already searched by law enforcement authorities,

16 which one would have hoped to cause him to conform his behavior
17 to the law, not only was he in a vehicle with methamphetamine
18 making material, he was in the vehicle with a 10-year-old boy
19 with the methamphetamine making material in the car. And there
20 was a loaded stolen firearm in the car. That is not conduct
21 that is indicative of somebody that is willing or able to
22 conform their conduct to the requirements of the law or
23 necessarily all that interested in rehabilitating himself.

24 Mr. Price has seven prior convictions. And also
25 troubling to me, he bases his claims here today or at least his

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1 counsel does, primarily on the notion that he's got a substance
2 problem with methamphetamine and he's a methamphetamine addict.
3 However, the presentence report indicates that at no time has
4 he ever tried to obtain any substance abuse treatment.

5 Your Honor, the facts of this case, the
6 circumstances of Mr. Price's background, as well as the
7 troubling aspects of the Ohio case, call for a sentence, I
8 submit to you, of nothing less than 10 years. I think there
9 are multiple factors in this presentence report which should

10 cause you to give Mr. Price a sentence closer to the high end
11 of the range than the middle of the range. Thank you.

12 THE COURT: All right. Pursuant to Booker and its

13 progeny, I'm required to consider various factors in imposing
14 sentence. Those would include, for instance, the nature of the
15 offense and, of course, in this case that involves the
16 manufacture of methamphetamine. And that is, to put it mildly,
17 a very serious offense. It is extremely addictive and
18 destructive. And it's also extremely dangerous in its
19 manufacture to innocent people in the vicinity.

20 The PSI report does indicate that this defendant has
21 a long drug addiction problem. Specifically, with
22 methamphetamine. And it does appear to be that his rather
23 significant criminal history has been driven in some or large
24 measure by that addiction.

25 In a case like this, the protection of the public,

1 given the danger inherent in methamphetamine and its
2 production, is a very significant consideration. And

3 deterrence is as well.

4 I also note that the defendant at the present time
5 is apparently serving a state sentence for methamphetamine, is
6 that right, Mr. Patton?

7 MR. PATTON: That's correct, your Honor.

8 THE COURT: So I've considered all of these factors
9 in fashioning the following sentence.

10 Would you please stand up, Mr. Price.

11 Pursuant to the Sentencing Reform Act of 1984, it is
12 the judgment of the court that the defendant, John Price Jr.,
13 is hereby committed to the custody of the Bureau of Prisons to
14 be imprisoned for a term of 115 months. The term of
15 imprisonment imposed by this judgment shall run consecutively
16 to the defendant's imprisonment imposed in Franklin County,
17 Ohio, Court of Common Pleas, Docket No. 05-CR-258.

18 Upon release from imprisonment, the defendant shall
19 be placed on supervised release for a term of three years.

20 Within 72 hours of release from the custody of the
21 Bureau of Prisons, the defendant shall report in person to the
22 probation office in the district to which the defendant is
23 released.

24 While on supervised release, the defendant shall not

25 commit another federal, state or local crime; shall comply with

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1 the standard conditions of supervision recommended by the
2 Sentencing Commission and adopted by this court; and shall
3 comply with the following additional conditions.

4 The defendant shall not illegally possess a
5 controlled substance.

6 The defendant shall not possess a firearm or
7 destructive device.

8 The defendant shall participate in a program of
9 testing and, if necessary, treatment for substance abuse as
10 directed by the probation officer, until such time as the
11 defendant is released from the program by the probation
12 officer.

13 Further, the defendant shall be required to
14 contribute to the costs of services for any such treatment in
15 an amount determined by the probation officer but not to exceed
16 the actual cost.

17 The defendant shall submit to one drug urinalysis
18 within 15 days after being placed on supervision and at least

19 two periodic tests thereafter.

20 It is further ordered that the defendant shall pay
21 to the United States a special assessment of \$100, which shall
22 be paid to the United States District Court Clerk forthwith.

23 I find that this defendant does not have the ability
24 to pay a fine and, therefore, will waive a fine in this case.

25 Just as an aside, with respect to Mr. Patton's

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1 request, that notwithstanding my finding under 3E1.1(b)
2 relative to the government's appropriate exercise of
3 discretion, that I nevertheless depart below the guideline
4 range. Without deciding the issue, that is to say assuming for
5 the sake of argument only -- assuming that I could depart, I'm
6 not saying that I could, I can't, I'm trying to clear this up
7 on appeal because I don't want this to come back on this point,
8 my sentence would be the same. It should be clear that my
9 refusal to depart was not necessarily based upon a conclusion
10 that I could not, it's a point I simply felt that I did not
11 have to decide.

12 Now, having said all that, Mr. Price, do you

13 understand that you do have the right to appeal this sentence

14 that I imposed here today?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you understand that if you choose to

17 do so, you must you do so within 10 days?

18 THE DEFENDANT: Yes.

19 THE COURT: Do you have any requests, Mr. Patton?

20 MR. PATTON: Yes, your Honor, we request that you

21 recommend to the Bureau of Prisons that Mr. Price be housed in

22 THE Bureau of Prisons facility in Victorville, California.

23 Mr. Price's girlfriend, Debbie Fischer, and their son are

24 residing in the Los Angeles area, so that would allow him to be

25 close to them.

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1 THE COURT: I'm going to make that recommendation.

2 I make that recommendation on the record. Do you have

3 something to dismiss?

4 MR. TRABOLD: We would move to dismiss Counts Two

5 through Seven.

6 THE COURT: That's granted. All right, we're in

7 recess.

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9 (Whereupon, at 2:35 p.m., the Sentencing proceedings

10 were concluded.)

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1 CERTIFICATE

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

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11 _____

12 Ronald J. Bench

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